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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUN 13 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of)
Commission's Equal)

Employment Opportunity Rules)

MM Docket No. 94-34

To: The Commission

COMMENTS OF
LICENSEES OF NINETY-EIGHT BROADCAST STATIONS

Erwin G. Krasnow
Michael D. Berg
Eric T. Werner
VERNER, LIIPFERT, BERNHARD,
MCPHERSON AND HAND, CHARTERED
901-15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000

June 13, 1994

SUMMARY OF COMMENTS OF THE LICENSEES
OF 98 BROADCAST STATIONS

MM Docket No. 94-34

Comprising a cross-section of the commercial radio and television broadcast industry, the licensees of the 98 stations participating in these Comments ("Licensees") support the goals of FCC equal employment opportunity (EEO) enforcement, but believe that current enforcement has grown out of control and out of focus. The current scheme needs substantial improvements which should be pursued in a Notice of Proposed Rulemaking (NPRM) issued as soon as possible.

The Notice in this proceeding raises constructive issues, such as the need for regulatory relief for smaller, and small market, broadcast stations. Other issues in the Notice, however, would perpetuate an unfortunate and counterproductive pattern of imposing layer upon existing layer of EEO regulation without regard to the resulting administrative burdens and other unwanted side effects which actually undermine Commission EEO goals. For example, the Notice notes that program diversity is the overall goal of EEO enforcement. Current regulation, however, actually undermines this goal by requiring licensees to divert substantial resources from programming to unnecessarily detailed EEO administrative requirements.

A prime instance of this type of misplaced approach is the current elevation of form over substance reflected in recent Commission decisions imposing sanctions upon stations which meet or exceed EEO processing guidelines, but which were found to have tripped over one or more of the myriad paperwork or recordkeeping details which are now viewed as of equal importance with EEO results. The new "66%/33%" standard, announced by the Commission in January, 1994 without full due process, exacerbates the elevation of procedure over results, and adds yet another layer to the still-used 50/50 and "overall efforts" enforcement criteria. Current enforcement is like a game of "gotcha" in which stations run the risk of heavy, increased fines and other sanctions even after the most diligent, good faith implementation of comprehensive EEO and affirmative action programs. Broadcasters should not, for example, be held liable for the non-performance of third parties such as referral sources over which the stations have no control even when they continually self-assess, review and revise their referral source listings.

To remedy these and other problems detailed in the Comments, the Commission should: repeal the "66%" standard; stop visiting sanctions for a seller's conduct on innocent station buyers; recognize the special circumstances of small and special-format, such as foreign language, stations; and clarify and streamline enforcement by restoring the "50/50" guideline to a presumption of compliance absent evidence of overt discrimination. The

Commission should issue a prompt NPRM to create a new partnership of government and broadcasters working together toward continued EEO progress.

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COMMENTS OF LICENSEES OF NINETY-EIGHT BROADCAST STATIONS

The licensees of the ninety-eight (98) broadcast stations identified in Appendix A (hereinafter "Licensees"), by their attorneys, hereby submit their Comments in response to the *Notice of Inquiry* in the above-captioned proceeding (FCC 94-103, released April 21, 1994) (hereinafter "*Notice*").

I. INTRODUCTION AND OVERVIEW

Licensees represent a cross-section of the commercial broadcast industry. Their stations are radio and television; in large, medium, and small markets; group and individually-owned; network-affiliated and independent. All are committed to the principle that all persons are entitled to a full and fair opportunity for employment and advancement without regard to race, color, national origin, religion or sex. Licensees support the Commission's efforts to prohibit employment discrimination by broadcast licensees, to eradicate sex and race discrimination from hiring and promotion decisions, and to ensure continuing, aggressive Equal Employment Opportunity ("EEO") programs. However, Licensees submit these Comments because of their increasing concerns, born of experience, that the Commission's EEO enforcement scheme has grown out of control and out of focus. Licensees recommend substantial and needed improvements in the means now used to achieve the Commission's EEO ends.

The Commission's current EEO policy and enforcement regime has several serious shortcomings. The current scheme is inappropriately rigid, leaves no room for flexible approaches to EEO progress, and fails to consider significant differences among stations which can affect their EEO programs. Current rules, relying upon artificial, arbitrary, and unreasonable criteria as a gauge, overemphasize rote "efforts" evidenced by voluminous mandatory paperwork records, and devalue, or even ignore, real EEO achievement. In short, the Commission's existing EEO framework elevates form over substance and creates so many sanctionable pitfalls that even the most diligent licensees cannot hope to achieve total compliance even by devoting considerable station resources to the task.

Current enforcement actually undermines program diversity -- the "overriding goal underlying [the] EEO rules" (*Notice* at 1) -- by diverting substantial resources from programming to the fulfillment of extensive administrative requirements and record-keeping. In addition, the new 66 percent recruitment standard penalizes broadcasters for conditions utterly beyond the stations' control: the non-performance of third parties -- referral sources -- who do not generate "adequate pools" of minority applicants.

II. ISSUES POSED BY THE NOTICE

The Commission issued its *Notice* in accordance with a schedule imposed by Congress in the Cable Act of 1992.^{1/} Recent events give the inquiry special importance. In January, 1994, the Commission adopted revised guidelines for assessing forfeitures for violations of its broadcast EEO rules.^{2/} The *Notice* gives broadcasters their first formal opportunity to address

^{1/} *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No.102-385, 106 Stat. 1460 (1992).

^{2/} *Standards for Assessing Forfeitures for Violations of the Broadcast Rules, Policy Statement*, 9 FCC Rcd 929 (February 1, 1994) ("Policy Statement") petitions for reconsideration and requests for clarification pending.

those changes. For this and other reasons detailed below, the Commission's invitation comes at a critical time.

The *Notice* poses many questions about the future direction of EEO enforcement. Some of these questions show sensitivity to broadcasters who bear the burden of EEO compliance.^{3/} Licensees welcome the Commission's concern and address these areas specifically herein. However, the *Notice* also advances numerous suggestions to extend the EEO rules and tighten the ratchet still further, proposing consideration of such questions as:

- Whether there is enough EEO regulation of promotion and retention, as opposed to mere hiring, of women and members of minority groups by broadcasters;
- Whether broadcasters, like cable operators, should be required to "encourage" female and minority-group entrepreneurs to do business with their stations;
- Whether the Commission should add on-site audits to the license renewal process; and
- Whether the Commission should require the collection and reporting of even more detailed information about recruitment and hiring.

These questions, Licensees submit, perpetuate the misdirected analytical pattern that has led EEO enforcement to its present incoherent state.

That pattern is as follows: An enforcement system is put in place. It fails to achieve all of the desired results. The Commission then responds by extending the agency's administrative reach into still more areas and imposing more limits on broadcasters' discretion. Yet, it invariably does so without considering whether these "remedies" exceed what is needed -- or

^{3/} For example, the *Notice* asks whether the Commission's EEO policies should be more responsive to the concerns of "small market broadcasters" and inquires as to what the Commission can do to decrease the administrative burdens of EEO enforcement without decreasing its effectiveness. *Notice* at 10-11.

effective -- to achieve the desired end. The historical record suggests that the Commission's convoluted treatment regimen for the disease of EEO problems has seriously weakened the patient.

The Commission could continue to foster EEO progress with far less burdensome means. However, there will be no significant reductions in administrative burdens unless the Commission rethinks its reflexive response to EEO enforcement. Regrettably, the proposals in the *Notice* that call for stepped-up EEO enforcement show no signs of such rethinking.

This analysis does not imply that the Commission should abandon its concern for equal employment opportunity. To the contrary: Working towards this goal, and thus making the best possible use of this country's talent, is crucial to our nation's economic success as well as our social well being. Broadcasters are more than willing to respond to the task constructively. Yet the regulatory demands have progressed to or approach the point at which they threaten some broadcasters' continued operation. This threat is unnecessary and counterproductive, and deserves to be taken seriously.

III. THE HISTORICAL DEVELOPMENT OF THE COMMISSION'S EEO POLICY REVEALS A PATTERN OF INCREASING ADMINISTRATIVE BURDENS WITHOUT CORRELATION TO THEIR EFFECTIVENESS IN ACHIEVING EEO OBJECTIVES

The course of the Commission's EEO efforts has not been steady or linear, but reveals a long-term trend of adding layer upon layer of regulation. Soon after the passage of the 1964 Civil Rights Act, the Commission began informally encouraging broadcasters to offer equal employment opportunity. In 1969, the Commission intensified its efforts, requiring the adoption of formal EEO programs by radio and television stations with five or more full-time employees.^{4/}

^{4/} *Nondiscrimination in Broadcasting*, 18 F.C.C.2d 240 (1969).

In the mid-1970s, the Commission began to impose numerical requirements. Called "processing guidelines," these stipulated at first that women and minorities should be represented on a station's full-time staff at one-half or more of their percentage in the local labor pool. For top-level positions, minority and female representation was to be 25 percent of their presence in the labor pool.^{5/} In 1980, the Commission tightened this "50 percent/25 percent" guideline to "50 percent/50 percent" for stations with 11 or more full-time employees,^{6/} and generated complaints about reliance on numbers that looked suspiciously like quotas.^{7/}

In the mid-1980's, the Commission sought to shift its emphasis from the numerical measurement of results to the evaluation of broadcasters' overall efforts to recruit women and minority-group members.^{8/} Yet the Commission did not replace its "numbers" approach in favor of a "best efforts" emphasis. Instead, it stacked the new criteria on top of the old, leaving the numerical standards of the "processing guidelines" in force. Under the new system, even if a station's numbers -- or results -- are adequate, the Commission might still review a licensee's record to insure that its EEO recruitment process and paperwork were extensive and detailed enough and conformed to prescribed ritual in each detail. The Commission said, appropriately, that the change had increased its enforcement efforts.^{9/}

^{5/} FCC Public Notice No. 14932 (March 10, 1977).

^{6/} FCC Public Notice No. 15528 (February 13, 1980).

^{7/} Mark Fowler, then Chairman of the Commission, said that the EEO processing guidelines "smack of quotas, pure and simple" and called for their elimination. BROADCASTING, February 18, 1985, at 39, 42.

^{8/} *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for recon. pending*.

^{9/} Remarks of Alfred C. Sikes, Chairman, Federal Communications Commission, before the National Black Media Coalition, October 13, 1989.

The Commission's most recent changes in policy have added yet another layer to the system. The "50 percent/50 percent" standard remains in effect.^{10/} The demand for elaborate documentation of a station's EEO efforts also remains and, indeed, actually increases significantly. And now, in addition, a new numerical standard has been introduced: Stations will now have to show that they "recruit so as to attract... adequate" pools of female and minority candidates for at least 66 percent of their job vacancies during the entire license term being reviewed.^{11/}

This pyramid of regulatory approaches and tests produces excessive administrative red tape, uncertainty and considerable unfairness. In today's complex and highly competitive multimedia marketplace, broadcast stations need regulation that is as clear, simple, and predictable as possible. Fairness should be the hallmark of the Commission's EEO enforcement scheme. We submit that the Commission should be more result-oriented and less tied to the process as an end in itself. The process is a means to an end, and broadcasters should have flexibility to determine how to get there.

IV. THE COMMISSION'S EEO ENFORCEMENT REGIME ECLIPSES THE POLICY IT IS INTENDED TO ADVANCE AND SACRIFICES BROADCASTERS' SUBSTANTIVE ACHIEVEMENTS IN THE HIRING OF MINORITIES AND WOMEN ON THE ALTAR OF ADMINISTRATIVE PROCEDURE

Like the sorcerer's apprentice who could not stop bringing water to a flooded room, Commission EEO enforcement has become a rote mechanical process disconnected from its original useful purposes. For years, attempting to comply with these shifting, layered standards has been a struggle for broadcasters. This burden has become heavier as reporting

^{10/} *Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, FCC 93-334 (July 23, 1993), ¶ 3.

^{11/} *Policy Statement*, *supra* note 2.

requirements have grown more elaborate. Indeed, according to data compiled by the Texas Association of Broadcasters, the annual cost of EEO compliance for a Metro market radio station can run as high as \$37,400.

Small stations bear an especially heavy load because they lack both the administrative resources to devote to the complex job of EEO compliance and the deep pockets needed to compete successfully for qualified female and minority-group personnel. Circumstances are also especially difficult for stations in communities that are small or have low minority-group populations.

Recent Commission decisions under the new policy have produced these extraordinary and irrational results: a station was fined \$25,000 although it had hired minority-group members at a rate of 100 percent of their representation in the local labor pool;^{12/} a church-run station was penalized in part because it gave employment preference to students at the denominational seminary;^{13/} stations were fined from \$18,750 to \$25,000 even though they employed minority-group members at 50 percent of their presence in the local labor force;^{14/} and punitive reporting conditions were imposed on a station that actually exceeded the new "66 percent" standard, on the grounds that the station had not made sufficient efforts as to the Hispanic component of its minority hires.^{15/}

^{12/} *San Luis Obispo Limited Partnership*, FCC 94-21 (February 1, 1994)

^{13/} *The Lutheran Church/Missouri Synod*, FCC 94-23 (February 1, 1994)

^{14/} *Eagle Radio, Inc. (KEGL-FM)*, FCC 94-17 (February 1, 1994); *Dennis Elam, Trustee (KMND/KNFM(FM))*, FCC 94-17 (February 1, 1994); *KTEM Radio, Inc. (KTEM/KPLE(FM))*, FCC 94-17 (February 1, 1994). This micro-management by the FCC recalls the mid 1970's era of rigid and Byzantine regulation of the community ascertainment process, in which applicants were ordered to interview more farmers, civic leaders or other group members to become qualified to hold a broadcast license. In 1981, the Commission streamlined this process, recognizing that it had become abusive and counterproductive of its goals. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981). The Commission should exercise similar good judgment now with respect to its EEO requirements.

^{15/} *North County Broadcasting Corporation*, FCC 94-19 (February 1, 1994)

These harsh and irrational results come at a time when the Commission has announced tougher sanctions, especially monetary forfeitures, for EEO violations. Thus, along with increased confusion comes an increased level of danger to a licensee who makes a wrong guess as to what the Commission will and will not approve.

V. THE COMMISSION SHOULD RETURN TO THE FUNDAMENTAL PRINCIPLES THAT UNDERLIE ITS EEO POLICIES, PROVIDE INTERIM RELIEF FROM THE MOST INAPPROPRIATE ASPECTS OF CURRENT ENFORCEMENT, AND CONDUCT A RULE MAKING TO EFFECT COMPREHENSIVE POSITIVE CHANGE

Commissioner Quello has stated that the time has come for "the Commission to change [its focus] in ensuring compliance with these important policies," and that "the best way of ensuring equal opportunities is by working with, rather than against, the very industry that must provide equal opportunities."^{16/} Licensees agree with Commissioner Quello. We suggest a return to basics. The Commission should reformulate its EEO enforcement mechanisms to fit the sharply focused perspective of its appropriate role in the EEO arena and the objectives it seeks to achieve.

As an initial matter, the Commission should recognize that its regulations in the EEO area, while salutary, are in addition to those of the EEOC, and are circumscribed by the regulatory objectives the Commission is charged by statute to oversee.^{17/} FCC regulation of

^{16/} *Midland Broadcasters, Inc.*, FCC 94-104 (April 19, 1994) (Concurring Statement of Commissioner James H. Quello) (hereinafter "Quello Concurring Statement").

^{17/} The courts have recognized the FCC's limited role in reviewing the employment practices of broadcasters. In *Bilingual Bicultural Coalition on Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978), the court stated that the "FCC in considering license renewals is [not] charged with an undifferentiated mandate to enforce the anti-discrimination laws . . ." *Id.* at 628; see also *National Org. for Women, New York City Chapter v. F.C.C.*, 555 F.2d 1002, 1017-18 (D.C. Cir. 1977). Similarly, in *Office of Communications of the United Church of Christ v. Federal Communications Commission*, 560 F.2d 529 (2nd Cir. 1977), the court observed: "EEO enforcement is not the FCC's mission." *Id.* at 531. The court observed that the FCC does not have an obligation to promulgate EEO regulations for broadcasters or to enforce them. *Id.* at 529. Congress delegated those responsibilities to the Equal Employment Opportunity Commission, the
(continued...)

broadcast employment practices stems from the Commission's broad mandate under the Communications Act of 1934, as amended, to regulate broadcasting in the public interest. As interpreted by the Supreme Court, the authority conferred by the public interest standard takes meaning only within the context of the underlying regulatory statute.

In *National Association for the Advancement of Colored People (NAACP) v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court held that a general grant of authority to regulate an industry in the "public interest" does not authorize the regulation of employment discrimination *per se*, and that discriminatory practices may be considered only to the extent that such conduct directly relates to the agency's particular statutory responsibilities. The Court further stated, however, that the FCC's regulations concerning discrimination by broadcasters can be justified insofar as they are "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Id.* at 670 n.7; *see also Metro Broadcasting Inc. v. F.C.C.*, 497 U.S. 547, 554-55 (1990) (affirming diversity of programming rationale as the basis of FCC's minority preference policy).

With this perspective in mind, the Commission should quickly follow this *Notice* with a Notice of Proposed Rule Making ("NPRM") to implement specific, positive change. The Commission's authority to do so is beyond question. Exercise of this discretion now is essential to streamline an antiquated and redundant set of policies and rules. The Commission should

17/(...continued)

Office of Federal Contract Compliance Programs and other federal agencies. In addition, various state and local governmental agencies have regulatory responsibilities concerning the employment practices of broadcasters. Indeed, the Commission itself has stated on many occasions that it is not the sole or even the primary agency responsible for the formulation and administration of federal discrimination policies.

store away its current sledgehammer of enforcement and replace it with a pin, a far more efficient means of bursting a bubble.

The NPRM should propose the following points, discussed in more detail below:

- Elimination of the 66 percent recruitment results standard;
- Renunciation of the policy of punishing the new owner of a station for the EEO record of the seller;
- Recognition of the special situations and concerns of small market broadcasters, stations with fewer than twenty-five full-time employees, and those with specialized ethnic formats;
- Clarification of the agency's EEO standards and enforcement policies;
- Rejection of the proposal to extend rules to require utilization of minority and female vendors; and
- Use of more incentives and fewer sanctions.

A. Elimination of the 66% Recruitment Results Standard

The new EEO policy enforcement guidelines enunciated in the Commission's January 31, 1994, *Policy Statement* are unfair, unnecessary, and violate the Administrative Procedure Act ("APA" or the "Act"). The *Notice* and the NPRM proposed by Licensees afford the present Commission an opportunity to correct these problems.

Section 553 of the APA requires agencies adopting new substantive rules to give prior notice and an opportunity for comment.^{18/} While prospective general policy statements are exempt,^{19/} this does not shield the *Policy Statement* from the reach of the Act because the new EEO enforcement standard is clearly not prospective. On the same day the Commission

^{18/} 5 U.S.C. § 553. In its *Policy Statement*, the Commission claimed to be establishing "non-binding guidelines for assessing, forfeitures for violations of the Commission's broadcast Equal Employment Opportunity (EEO) rules."

^{19/} 5 U.S.C. § 553(b)(A).

released the *Policy Statement*, it also released decisions involving a dozen cases in which the new policy had already been applied. In these cases, even the license terms being examined had ended well before the new policy was promulgated.^{20/} This retroactivity belies the claim that the policy is exempt from APA requirements and raises fundamental due process considerations.

The *Policy Statement*: (1) does not tell broadcasters what will be considered an "adequate pool of minority/female applicants or hires;" (2) does not make clear whether broadcaster efforts must aim at adequate pools for 66 percent of vacant positions, or whether those levels must be achieved; and (3) leaves unclear whether the main focus is to be applicants, actual hires, or both. Moreover, the policy does not clarify the relationship between the new "66 percent/33 percent" standard and the old "50 percent/50 percent" processing guidelines still in use.

In addition to creating confusion, the "66 percent" standard unfairly imposes sanctions on licensees who meet the 50/50 guideline -- and even hire minorities and females at 100 percent of parity -- but cannot document an 'adequate applicant pool.' Because it over-emphasizes "results" rather than "efforts,"^{21/} the 66 percent test penalizes licensees who engage in good faith, sustained recruitment efforts but whose efforts are unsuccessful in any detail. The standard also discriminates against stations located in areas with relatively small minority group populations or markets which are unattractive to applicants.

Under this new standard, a licensee is at risk for the imposition of sanctions based on factors wholly beyond its control. For example, a licensee cannot control whether a particular

^{20/} *North County Broadcasting Corporation*, *supra* note 14; *Roy H. Park Broadcasting of Washington, Inc.*, FCC 94-18 (February 1, 1994); *The Lutheran Church/Missouri Synod*, *supra* note 13; *San Luis Obispo Limited Partnership*, *supra* note 12; *Stauffer Communications, Inc.*, FCC 94-20 (February 1, 1994).

^{21/} At a minimum, if the "66%" standard is not rejected out of hand, the Commission should apply the standard only to recruitment efforts undertaken, not to the results of those efforts.

recruitment source fails to refer qualified minority applicants despite repeated requests and continued assessment and revision of referral sources used.

Nothing in the Commission's current or past EEO rules requires the recruitment, hiring or promotion of employees who are unqualified for the jobs in question. Yet that is often the Hobson's choice of broadcasters whose recruitment efforts, even when in full compliance with the FCC's rules, do not yield the desired results. This is a devastating problem particularly, but not exclusively, in smaller markets.

The old "50 percent" processing guideline, while distasteful in the way all numerical standards are, may at least provide predictability if it is used as a clear threshold presumption of adequate performance. Thus, if a station's employment percentages do not meet the processing guidelines, the Commission will review its EEO program to determine whether or not the station has made a good faith effort to increase the pool of qualified minority and female applicants and to determine if it has complied with the provisions of Section 73.2080 of the Commission's rules. Beyond that, the Commission should surely monitor "best efforts" but not in the formalistic and puzzling fashion displayed in the Commission's recent EEO opinions.

B. Elimination of the Policy of "Presumed Guilty": Punishing the Buyer of a Station for the EEO Record of the Seller

It has been the policy of the Commission to implement its affirmative action rules "to lead a licensee who has not possessed an adequate affirmative action program in the past to adopt policies ensuring an active recruitment program and genuine equal employment opportunity in the future." *National Broadcasting Co.*, 58 F.C.C.2d 419, 422 (1976). In its efforts to ensure affirmative action and anti-discrimination by licensees of broadcast stations, the FCC has employed a broad range of administrative sanctions. Until the Commission's decision in *Woolfson Broadcasting Corp.*, 4 FCC Rcd 6160 (1989), the FCC and reviewing courts

concentrated on the responsible licensee's conduct, and imposed sanctions on that licensee.^{22/}

Woolfson, however, punished the stations involved (rather than the licensee) and ignored the lack of culpability of the new licensee.

The notion that an innocent party will be held accountable for the conduct of another is abhorrent to the concept of fair administration of the Commission's rules. The ruling in *Woolfson* is also a clear departure from well-established Commission precedent.^{23/} If a licensee has failed to comply with the Commission's EEO rules, appropriate sanctions are warranted against the licensee. By punishing the assignee, the Commission discourages the transfer of stations from offending licensees to those who are more likely to adhere to the Commission's standards.

Furthermore, this "presumption of guilt" approach contravenes well-established Commission policy against the imposition of sanctions against an indisputably innocent assignee who has had no notice or opportunity to contest the sanctions. Before granting an application to assign a broadcast license, the Commission must assess whether the assignor has complied with Commission rules and policies during its tenure as a licensee. *See Jefferson Radio Company v. F.C.C.*, 340 F.2d 781 (D.C. Cir. 1964). This ensures that a miscreant assignor will not profit

^{22/} See, e.g., *Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 76 F.C.C.2d 385 (1980); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licenses*, 42 F.C.C.2d 522 (1975); *Bilingual Bicultural Coalition on Mass Media, Inc. v. F.C.C.*, 595 F.2d 621, 628 (D.C. Cir. 1978).

^{23/} In *Rust Communications Group, Inc.*, 61 F.C.C.2d 548 (1976), *aff'd. on recon.*, 64 F.C.C.2d 632 (1977), the Commission held that the imposition of sanctions would be "inappropriate" because there was no indication that the assignee had failed or would fail to conform fully with the Commission's EEO rules and policies. *Id.* at 553. On reconsideration, the Commission affirmed its decision, concluding that the onus of sanctions improperly would fall on the assignee, serving "no useful purpose" in light of the new licensee's administration of its own documented EEO program. *Rust*, 64 F.C.C.2d at 634. Any other action, the Commission ruled, would result in the proposed assignee "innocently bear[ing] the burden of such sanctions." *Id.* at 633 n.2.

from the assignment of the license.^{24/} But outside the EEO area the Commission has never sought to punish the innocent assignee for the violations of the assignor. The Commission has traditionally sought to protect innocent parties who purchase interests in broadcast stations without knowledge of or complicity in wrongdoing, even if the wrongdoing took place while they owned interests in the station.^{25/}

A fortiori, the Commission should not impose sanctions against an innocent assignee who had no connection with the offending licensee when the wrongdoing took place and was not provided notice or the opportunity to contest the sanctions. *See Gottfried v. F.C.C.*, 655 F.2d 297, 310 (D.C. Cir. 1981) (renewal applicant entitled to notice and opportunity to be heard before sanctions may be imposed). The Commission should evaluate a station buyer on its own record of EEO performance and, if qualified to be an FCC licensee, there is no reason to presume the buyer will not comply without being penalized for the violations of its predecessor.

C. Recognition of the Special Circumstances and Concerns of Small Market Broadcasters, Stations with Fewer than Twenty-five Full-time Employees,^{26/} and Special-format Stations

In its *Notice*, the Commission noted that "broadcasters sometimes state that they are located in small markets and that they have unique difficulties attracting and retaining minority employees because of their location. *Notice* at 10. The United States Court of Appeals for the

^{24/} "[A] licensee cannot act improperly in the broadcast field and, when challenged, simply sell his station at a profit or without a loss; if this were permitted, such a licensee would have little reason to obey the Act" *Tidewater Teleradio, Inc.*, 24 Rad. Reg. (P & F) 653, 657 (1962).

^{25/} *See, e.g., KOZN FM Stereo 99 LTD.*, 5 FCC Rcd 2849 (1990); *Second Thursday Corp.*, 22 F.C.C.2d 515, *recon. granted*, 25 F.C.C.2d 112 (1970).

^{26/} It is not unusual for even a small radio station, whether or not in a small market, to have 20 to 25 employees. Such stations are still small businesses for whom administrative burdens can have a severe effect. In addition, stations of this size can meet or exceed processing guidelines based on the presence or absence of a single person in the station's employment profile at the time of the pay period covered by the Annual Employment Report. Accordingly, a threshold of at least 25 is recommended.

District of Columbia Circuit recently recognized that station location and other geographic and demographic characteristics unrelated to race or gender may have an adverse impact upon a station's ability to attract minority applicants. For instance, the court found nothing suspicious, and indeed, found "quite reasonable" as the basis for its difficulty in hiring, the station's explanation that

[t]he bulk of the minorities within the MSA lived 25 miles away . . . [and were] separated from the station by inadequate highways and a lack of public transportation. The company's salaries, moreover, were said to be significantly lower than station ins the urban area, so it was difficult to attract anyone from those areas given the long and difficult commute. The minority population close to the station, which was in the range of 3-5%, was largely involved in agricultural work and therefore . . . unavailable for employment at the station.

Florida State Conference of Branches of the NAACP v. F.C.C., No. 93-1162 (D.C. Cir. May 27, 1994), at 34, 6-7. These factors -- location, customarily lower salaries, reduced opportunities for advancement, and specialized station formats (discussed below) -- all place small stations at a disadvantage in hiring, particularly in the competition with larger urban stations. The Commission should incorporate into its EEO enforcement procedures consideration of these types of special factual circumstances.

For example, the Commission should consider taking such actions as exempting small stations from the "dominant minority" test; refraining from imposing sanctions except in the graduated manner proposed by Commissioner Quello (*see infra* Section V.F.); and, at a minimum, providing for the immediate suspension of the new 66 percent test as to small stations (if not all stations). It is unfair, counterproductive, and contrary to the mandate of the Paperwork Reduction Act to place heavy record-keeping requirements on such stations if they have achieved minority and female employment profiles within the processing guidelines. In the NPRM which Licensees recommend be issued, the Commission should , therefore, explore these and other ways to assure appropriate enforcement with respect to smaller stations.

The *Notice* properly recognizes that small market broadcasters may have particular difficulty in complying with the current inflexible regime. Specialty format stations also fall within this category. At present, Commission EEO enforcement makes no allowance for specialized formats, yet the *Notice* reiterates that programming diversity is the principal EEO goal. It is ironic that stations willing to take the risks of serving underserved audiences, thereby dedicating themselves to program diversity, can be penalized by current EEO rules for doing so. This flies in the face of Congressional and agency intent.

A station that is a mainstay of Asian language programming provides an illustration of this incongruity. In theory, such a station may be able to recruit and retain "sufficient" numbers of other minority groups, such as Hispanics, which have also been traditional victims of discrimination. But in fact such a station may also have extraordinary difficulty in doing so. Just as the station's foreign language programming is watched primarily by Asian-American audiences, it is not surprising that the station may exceed even 100 percent of parity in employment of Asian Americans, while being unable, despite sustained good faith efforts, to meet the processing guidelines as to one or more other minority groups.

The interests of the Commission in such cases should be to assure that there is no unlawful discrimination, and that an ongoing EEO/affirmative action program is maintained as to women and all protected minorities. But rigid compliance with every aspect of the same guidelines applicable to non-specialty stations should not be required. A station should not have to risk EEO sanctions "by the numbers"^{27/} for promoting program diversity and equal

^{27/} If one minority group is predominant in an area, the Commission expects a station to achieve 50% of parity with respect to that particular group. *Alabama and Georgia Broadcast Station Renewals*, 4 FCC Rcd 5968 (1991).

opportunity. For qualified specialty stations^{28/} the Commission should not apply the "dominant minority" test, and should limit its inquiry to the absence of discrimination and maintenance of an EEO program directed to all, without the risk of sanctions for below-guideline results.

D. Clarification of the Commission's EEO Standards and Enforcement Policies

At a time when participants in the public policy process are encouraged to "reinvent government," we suggest that part of the reinvention must return to the fundamental administrative desiderata: clarity, simplicity, and predictability. These regulatory features will allow broadcasters to plan for the future, and we have confidence that the Commission can provide them. As the Commission pointed out in the *Notice* the overriding goal underlying its EEO rules is to promote program diversity. However, inappropriately rigid policies and unnecessary paperwork requirements undermine program diversity by diverting the limited resources of broadcasters from program development and acquisition to the task of maintaining the requisite paperwork.

The Commission should cut through the overlapping layers of current enforcement by taking such steps as:

(1) Restoring the 50/50 guideline, which is a measure of results, to a presumption of EEO compliance. Absent evidence of overt discrimination or other unusual circumstance, the Commission should end its review if a station meets the guideline;

(2) For stations not meeting the guideline, further FCC inquiry should apply a "good faith effort to comply" standard, not a mechanistic search for forfeiture opportunities. Stations should never be sanctioned for the non-performance of third parties such as referral sources.

^{28/} For this purpose, it is suggested that specialty stations be defined as those having at least one-third of the hours of an average broadcast week, and one-third of weekly prime time hours, devoted to foreign language programming.

Forfeitures and other sanctions should be reserved for the rare licensee who disregards EEO requirements. For stations who can show diligent implementation of EEO programs that have not produced guideline-level employment, the Commission's focus should be future steps to increase the effectiveness of the program, not sanctions; and

(3) Create a system of special recognition for stations which have employed innovative approaches and achieved exemplary results. In this way useful information about intractable problems would be shared on a nationwide basis. This type of approach reflects a much-needed change in the Commission mind-set on EEO. Government needs reinventing in this critical respect. EEO should not be a gauntlet which stations must run, a game of "gotcha" which stations cannot win. It should be a cooperative partnership between the Commission and stations toward shared goals.

E. Rejection of the Proposal to Extend the Rules to Require Broadcasters to Utilize Minority and Female Vendors

The *Notice* asks whether the Commission should impose a new requirement that broadcasters affirmatively seek to use the services of minority and female entrepreneurs. *Notice* at 11. Such a requirement exceeds the FCC's jurisdiction because it relates to the contracting practices, not employment practices, of broadcasters.

The Commission does not possess the authority under the Communications Act to review the business practices of broadcast licensees. While it is true that a contracting requirement is contained in Section 76.75(f) of the Commission's cable EEO rules, that provision is mandated by Section 554(d)(2)(E) of the Cable Act of 1992, which explicitly provides that each cable system shall "encourage minority and female entrepreneurs to conduct business with all parts of its operation." Moreover, it is difficult to see how the contracting requirement would promote the Commission's goal of program diversity, and, by definition the selection of outside

contractors would not increase the representation of minorities or women on broadcast station staffs.

F. The Use of More Incentives and Fewer Sanctions

Although the most implacable critics of the industry might not envision it, making EEO efforts more a function of a station's own initiative will most likely improve performance and results. By contrast, recent FCC decisions, as Commissioner James Quello has observed, seem "designed to pit Big Brother against industry."^{29/} We agree with Commissioner Quello that compliance with the Commission's EEO policies should be encouraged by means other than "harsh punishment." The time has come for the Commission "to change [its] focus."^{30/}

Commissioner Quello's two suggested approaches warrant adoption. He advocates a "three strikes and you're out" policy: the first violation of the Commission's EEO or other rules (except for rules involving safety or intentional rule violations) would result in a warning and the imposition of reporting conditions; a second violation would result in a fine and a short-term renewal; a third violation would result in a larger fine or designation for hearing. Another option proffered by Commissioner Quello would be to allow broadcasters to settle cases where justified, entering into a consent decree with the Commission that is mutually beneficial to all parties involved.

Underlying Commissioner Quello's suggestions is a perception which we share emphatically: EEO enforcement has become an elaborate game of "gotcha." There are so many detailed requirements, so many records that must be kept, so many "I's" to dot and "T's" to cross that it is nearly impossible to comply completely. Even the most exemplary stations, sparing no effort or expense, cannot reasonably hope to avoid missteps. There are no grace periods.

^{29/} Quello Concurring Statement, *supra* note 16.

^{30/} *Id.*

Sanctions are harsh and not significantly keyed to the circumstances of the "offense." A first offense, for example, can cost a licensee \$25,000.^{31/}

In short, the EEO process has become abusive and unfair. An abusive system of regulation, we respectfully suggest, is an inappropriate way to address the historic abuse of a lack of equal opportunity. Put simply, two wrongs do not make a right.

Instead, the Commission should adopt measures that accentuate positive conduct by licensees. For example, the Commission could consider offering incentives to stations which exceed the processing guidelines, or which show significant improvement from one year to the next, or which undertake innovative or exceptionally successful methods of recruitment, training or promotion. The Commission should allow plenty of room for creative, individualized solutions to EEO problems, and recognize those stations that show leadership in these areas.

Many potential ways exist to achieve the goals of Congress and the Commission in the EEO area. Current enforcement is a rigid, sanction-oriented elevation of form over substance. Flexibility and creativity -- the end, not the means -- should be the Commission's focus.

VI. CONCLUSION

FOR THE FOREGOING REASONS, the undersigned Licensees request that the Commission expeditiously issue a Notice of Proposed Rule Making to revise and improve the

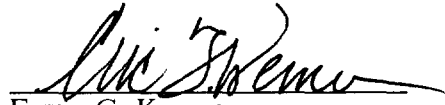
^{31/} See, e.g., *Stauffer Communications, Inc.*, FCC 94-20 (February 1, 1994).

Commission's EEO rules and their enforcement in the ways recommended herein.

Respectfully submitted,

**LICENSEES OF NINETY-EIGHT
BROADCAST STATIONS**

By:



Erwin G. Krasnow

Michael D. Berg

Eric T. Werner

VERNER, LIPIFERT, BERNHARD,

MCPHERSON, AND HAND, CHARTERED

901 - 15 Street, N.W.

Suite 700

Washington, D.C. 20005-2301

(202) 371-6000

Their Attorneys

Attachment (Appendix A: List of Licensees)